

Integrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine

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Moral rights are "personality" rights which have long been part of the copyright law regimes of many European and other jurisdictions, however these rights have only recently begun to be integrated into U.S. law. With the acceleration of global legal harmonization of copyright laws, most notably including the Berne convention, the issue of how and to what extent moral rights should be integrated into U.S. law has become more pressing. A number of areas of conflict between moral rights and U.S. copyright law exist, including aspects of the U.S. work for hire doctrine. This Paper gives a brief history of moral rights and their application in the United States. The author argues that some moral rights, chiefly the rights of attribution and the droit de suite, are economic rather than "personality" rights. The author concludes by making the argument that the U.S. work for hire doctrine should be modified to accommodate the integration, at least in a limited sense, of those moral rights which may properly be viewed as economic rights.

I. INTRODUCTION

The accession to the Berne Convention and the passage of the Visual Rights Artists Act¹ ("VARA") have begun to force an issue which has been nagging at the United States for some time: How to cope with moral rights. Moral rights have long been part of the law of other nations, nations with which the United States does a substantial amount of trade. In addition, the Internet has, because of its ubiquity without regard for geography, created urgent need for international harmonization of copyright laws. As such, the constraints of doing business in multiple legal systems has forced the hand of the U.S. Congress in order to facilitate trade.

This Paper argues that the full integration of at least some moral rights into American copyright law is supportable for two principal reasons: First, a uniform international copyright scheme is desirable, and second, that moral rights can be reasonably viewed as economic rather than "natural" or personality rights. This latter proposition is somewhat unorthodox and controversial. This Paper does not dispute that moral rights originated as personality rights, distinct from economic

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¹ Visual Artists Rights Act of 1990, Pub. L. No. 101-650 (1990) (codified as amended in scattered sections of 17 U.S.C.).

rights. However, the analysis below of the application of various moral rights to the work for hire doctrine takes notice of the fact that regardless of their original purpose (protecting noneconomic rights) the application of moral rights can have substantial economic consequences and therefore these rights can be properly viewed as economic rights. Although this interpretation of moral rights represents a shift in the way these rights are considered, such a change is gradually gaining support.²

When calls go up from the United States for harmonization of international intellectual property law they often call to have the rest of the world harmonize with the United States, and to do away with moral rights. This would be an undesirable result for both economic and noneconomic reasons.

Much of the tension between moral rights and American copyright law may derive from the work for hire doctrine, which is squarely at odds with certain moral rights.³ This Paper analyzes the extent to which the work for hire doctrine conflicts with each of the rights falling under the general rubric of "moral rights." The argument then concludes that the United States should modify the work for hire doctrine in order to accommodate at least the moral right of attribution, thereby empowering authors and allowing them to more fully capitalize on their ingenuity and creativity. While there are numerous issues raised by any attempt to square moral rights with American copyright law, the scope of this Paper will be limited to how moral rights interact with the work for hire doctrine, individually and collectively.

II. MORAL RIGHTS

A. *The History of Moral Rights in the United States*

There is no tradition of moral rights in the United States.⁴ Intellectual property rights derive from the U.S. Constitution,⁵ and as such are statutorily-created rights. Moral rights are a creation of civil law, and are generally viewed as "natural" rights.⁶ Not only have moral rights not played a part of American

² See, e.g., Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 63-68 (1997).

³ The crux of the work for hire doctrine, explained in more detail *infra* Part III.A., is that when one is hired to create a work, the work is legally authored by the employer. Thus, the moral rights of attribution, integrity, and the *droit de suite*, all conflict with the basic idea of a work for hire by vesting in authors ongoing and inalienable rights.

⁴ See, e.g., *Gilliam v. American Broad. Co.*, 538 F.2d 14, 24 (2d Cir. 1976).

⁵ U. S. CONST., art. I, § 8, cl. 8.

⁶ See generally Ciolino, *supra* note 2, at 43 (classifying moral rights as "noneconomic"); Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTEL. PROP. L. REV. 1,

law, but they have been viewed in the United States, at least by the U.S. Congress, with little affection.

It is no surprise then that the United States should encounter difficulty when trying to incorporate moral rights into U.S. law; it is difficult, conceptually and practically, to attach natural rights as an add-on to statutory rights. Indeed, this problem is exemplary of the basic conflict between natural law and statutorily-based law; viewing law as having its basis in a document is a fundamentally different paradigm than viewing law as existing in an intangible and existential form.⁷

In order to successfully attach moral rights to American law it would be necessary to effectuate significant change in the fundamental goals and philosophy of the federal copyright law. Questions are thus begged: Is this a desirable goal, and if so, why? If there is truly a need for a harmonized international copyright scheme, the answer to the first question should be yes. Given the ease with which intellectual property can cross political borders in the "information age," a harmonized international law of copyright is desirable. Business can be done more efficiently when there exist predictable and regularized legal consequences for a given action. One appropriate role of government is to facilitate efficient economic systems. Thus, it follows that an appropriate aim of government should be to pursue international harmonization of copyright law.

Regardless of one's views on the desirability of internationalization, the fact is that data technology has made it a reality, for good or ill. The Internet is an environment where copyrighted works exist in every jurisdiction with a web connection.⁸ Thus, the question of whether the internationalization of law is

1 (1997) [hereinafter *How Art Fares*]; Roberta Rosenthal Kwall, *Copyright and Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 7 (1985) [hereinafter *An American Marriage*]; Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C. L. REV. 363, 364 (1990) (berating Congress for failing to appreciate the distinction between economic and moral rights).

⁷ The very concept of natural law, which assumes the existence of some objective truths, can be difficult for Americans, accustomed to referring all law back to a tangible source, i.e. the U.S. Constitution.

⁸ The Ninth Circuit has held that "copying," for the purposes of copyright infringement analysis, occurs when a computer program is transferred from a permanent storage device to a computer's random access memory. See *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993), cert. dismissed, 510 U.S. 1033 (1994). Thus, any time a computer user accesses a copyrighted work on a personal computer in the U.S., U.S. copyright law is implicated. However, this result may not be the same in every jurisdiction around the world. If a given act constitutes copyright infringement in one country, but it does not in another, obvious problems in defending the rights of authors whose works are on the Internet arise. This example illustrates the point that the Internet forces global considerations in regard to copyright

desirable or not is already moot. To the extent that disharmony among the copyright laws of different nations may produce inconsistent results for authors trying to enforce their rights, such legal disharmony serves merely as an impediment to the free flow of data—an essential component of market efficiency in an information economy.

Other nations recognized this long ago, and pragmatically responded with the Berne Convention.⁹ Although in its first incarnation the Berne Convention was principally concerned with the high-minded ideal of preserving fine art (analogous, perhaps, to the Endangered Species Act today), it evolved into a very successful piece of international legislation, and currently enjoys wide legislative support from most of the world.¹⁰ Yet the Berne Convention has received only

law.

⁹ The Berne Convention was first enacted by several European states in 1896, 56 years before these states were able to achieve meaningful uniformity in other political contexts (i.e. the Treaty of Rome). See Diego A. Ramos, "Oh, Pretty Woman," *Luke Took Your Beauty Away, May NAFTA Come to Your Rescue?* Campbell v. Acuff-Rose: *Can There Ever Be "Moral Rights" in the United States or Puerto Rico?*, 29 REVISTA JURÍDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO [INTERAMERICAN UNIVERSITY OF PUERTO RICO LAW REVIEW] 173, 174 (1995). Given the wide divisions between European states at the time of enactment, the Berne Convention can be viewed as an outgrowth of Western Culture: One of the few things that Europeans could agree on in the 19th century was a respect for fine art.

¹⁰ As of March 20, 2000, the following 143 states were party to this Convention: Albania, Algeria, Antigua and Barbuda, Argentina, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Barbuda, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Namibia, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal (including Macau), Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Tajikistan, Thailand, the former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yugoslavia, Zambia, Zimbabwe. See World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works (last modified Mar. 20, 2000), <<http://www.wipo.org/eng/ratific/e-berne.htm>>.

grudging support from the world's leading purveyor of intellectual property, the United States.

Congress has consistently resisted calls for greater moral right protection. The United States steadfastly refused, for almost 100 years, to adopt the Berne Convention, largely because of Congressional dislike of moral rights.¹¹ The issue of moral rights was neatly sidestepped when protests to Congress against colorization of classic films by a cadre of directors and producers resulted in passage of the National Film Preservation Act ("NFPA") of 1992.¹² The NFPA gives no moral right protection—essentially what was being sought¹³—but simply provides for archiving black and white film prints. Thus, Congress managed to appease the artists without really affecting the copyright laws.¹⁴ The NFPA is indicative of the general animus toward moral rights traditionally expressed by Congress.

The most significant advance in the development of moral rights in American federal law was the passage of the Visual Artists Rights Act.¹⁵ VARA gives authors of visual works the right to enjoin alteration of the works where it will adversely affect the artists' reputation,¹⁶ a highly subjective determination. Although the United States formally acceded to the Berne Convention two years prior to the passage of VARA, the passage of VARA was arguably a more concrete step toward accepting moral rights, because of the limitations placed on the Berne Convention.¹⁷ Yet because passage of the Berne Convention was strongly opposed by the entertainment and publishing industries,¹⁸ its passage could rightly be viewed as an important psychological hurdle in Congress's acceptance of moral rights.¹⁹ However, U.S. courts will not look to the Berne

¹¹ See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 96–97 (1997).

¹² See 2 U.S.C. § 179 (1992).

¹³ Specifically the right of integrity. Descriptions of this and the other traditional moral rights are found *infra* Part II.E.1.

¹⁴ See 2 U.S.C. § 179.

¹⁵ Visual Artists Rights Act of 1990, Pub. L. No. 101-650 (1990) (codified in scattered sections c^f 17 U.S.C.).

¹⁶ See Kwall, *How Art Fares*, *supra* note 6, at 2.

¹⁷ See S. REP. NO. 100-352 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714–15.

¹⁸ See *id.* at 3708.

¹⁹ See H.R. REP. NO. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925, stating:

An artist's professional and personal identity is embodied in each work created by that artist. Each work is a part of his or her reputation. Each work is a form of personal expression (oftentimes painstakingly and earnestly recorded). It is a rebuke to the dignity

Convention as controlling law because the Implementation Act explicitly provides that the treaty is not self-executing.²⁰ Therefore, there is no private right to action directly under Berne.²¹

Courts construe international treaties as being in harmony with the U.S. Constitution. To the extent that moral rights might be seen to conflict with the constitutional grant of intellectual property rights, it seems likely that the moral right provisions of the Berne Convention will be given limited or no effect. Thus the passage of VARA is, as a practical matter, more significant in actually bringing moral rights to American law.

Although Congress has manifested precious little interest in developing moral rights further,²² the states have proceeded with the passage of various moral right provisions.²³ How the courts will view state moral right provisions in light of federal preemption remains to be seen. It is noteworthy that while Congress remains so unwilling to explore moral right expansion there seems to be a groundswell of support from the states. But despite this expression of popular support for moral rights, state legislation is vulnerable to preemption in such a solidly federal area as intellectual property.

B. *What Are "Moral Rights?"*

Before continuing this analysis it is important to review the rights in question. In a sense, it is misleading to refer generally to "moral rights" because the term is used to refer to a group of concepts whose constituent parts often depend on who is making the reference.²⁴

of the visual artist that our copyright law allows distortion, modification and even outright permanent destruction of such efforts.

Id.

²⁰ See Patrick G. Zabatta, Note, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095, 1098 (1992).

²¹ See *id.*

²² See *id.* (noting that the Berne Convention Implementation Act of 1988 explicitly states that "no expansion of moral rights was intended by United States accession to the treaty.").

²³ See, e.g., Kwall, *How Art Fares*, *supra* note 6, at 30-31 nn.166-72 and accompanying text.

²⁴ Compare Kwall, *An American Marriage*, *supra* note 6, at 5 (describing moral right as consisting of the rights of disclosure, paternity, and integrity) with Hansmann & Santilli, *supra* note 10, at 95-96 (stating that moral right generally is thought to have four components: the rights of integrity, attribution, disclosure, and withdrawal) and with Ramos, *supra* note 9, at 174-75 (stating that moral rights generally include the right of integrity, withdrawal, attribution, disclosure, the right to preclude others from claiming authorship, and the *droit de suite*).

The United States is not alone in its reluctance to adopt what it views as foreign law; moral rights are not harmonized among European Union member states either, despite European Union harmonization of a wide variety of legislation. Various levels of protection are enjoyed by artists in different European States.²⁵ While all European Union members are Berne signatories, the European Commission has avoided attempting to harmonize moral rights across Europe. The 1993 directive harmonizing the term of copyright explicitly exempts moral rights.²⁶ The directive on protection of databases recognizes moral right as falling outside its scope. Recently the European Parliament Committee on Legal Affairs and Citizens' Rights recommended a directive harmonizing moral rights.²⁷

In the interests of clarity, this Paper will use the term "moral rights" to include the rights of: attribution, integrity, disclosure, withdrawal, and *droit de suite*. Where appropriate, specific rights will be analyzed by name so as to avoid confusion.

The right of attribution is essentially the right to be credited as an author of a work. The right of attribution directly conflicts with the U.S. work for hire doctrine, which credits the employer or commissioner of a work with its authorship. A corollary, the right of "negative attribution," is the right to not have one's name attributed to a work which one did not create.²⁸ The right of negative attribution is generally part and parcel of the right of attribution, and is included in the limited right of attribution created by VARA.²⁹

The right of integrity is the legal right to object to the alteration or destruction of a work.³⁰ This right is similar to the right to prepare derivative works, under U.S. law, in that the author maintains a continuing right to prevent alteration after he has sold the work.³¹ However, prior to U.S. accession to the

²⁵ France, for example, has an absolute right to enjoin the destruction of an artistic work, see Kwall, *An American Marriage*, *supra* note 6, at 12 n.45, while Switzerland simply requires that an owner who wishes to destroy a piece of art must first offer to sell it to the artist for the cost of the materials which went into it. See Swiss Federal Act on Copyright and Neighboring Rights of 1992 (RS 231.1) § 15; Marina Santilli, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 100 (1997).

²⁶ See Council Directive 93/98/EEC of 29 October, 1993, preamble, para. 21 (harmonizing the term of protection of copyright and certain related rights).

²⁷ See Resolution on the Green Paper on Copyright and Related Rights in the Information Society, European Parliament Committee on Legal Affairs and Citizens Rights, EUR. PARL. DOC. (COM (96) 0568-C4-0090/97), 15, 39 (1997).

²⁸ See Hansmann & Santilli, *supra* note 11, at 130.

²⁹ See *id.*; 17 U.S.C. § 106A (1990).

³⁰ See, e.g., Hansmann & Santilli, *supra* note 11, at 99-100.

³¹ An important distinction should be noted, however: Sale of a particular work is not

Berne Convention and the passage of VARA there was nothing in U.S. law that prevented a purchaser of a work from destroying it.³² The Berne Convention provides that an author shall have the right "to object to any distortion, mutilation, or other modification of . . . the work, which would be prejudicial to his honor or reputation."³³

Although case law pertaining to VARA is still scarce, it seems that American courts are instinctively hostile to the right of integrity,³⁴ and have relied on the work for hire doctrine to avoid granting it.³⁵ Common law courts have always been loathe to infer servitudes, and the right of integrity is basically a form of equitable servitude. As a related matter, courts have also traditionally rejected constraints on the free alienability of property. The two principles are conceptually related; Anglo-American jurisprudence believes in the proposition that property should change hands without any kind of ongoing encumbrance. Thus, the right of integrity may well meet strong resistance from the courts on the theory that it is inconsistent with the free alienability of property.

The right of disclosure is the right to withhold a work until the creator feels it is complete.³⁶ In a sense, this right is not dissimilar to the right of integrity; the right to have a work kept free from distortion is essentially a right to determine the final shape of the work. The right of disclosure can thus be viewed as a subspecies of the right of integrity.

An argument could also be advanced that the right of disclosure is not dissimilar to the First Amendment right of expression; the freedom to express

the equivalent to sale of the underlying copyright in the work. An author who has sold the copyright along with the work does *not* have a continuing right to enjoin the preparation of derivative works. Only authors who have sold their works while retaining the copyrights may do so. *See* 17 U.S.C. § 202 (1994).

³² *See, e.g., Seshadri v. Kasraian*, 130 F.3d 798, 803 (7th Cir. 1997) (noting that while the moral right of integrity is actionable in Europe, it is not under the U.S. Copyright Act).

³³ *Id.*; *see also* Paris Act of the Berne Convention, Article 6bis.

³⁴ *See, e.g., Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997) (disapproving the notion that an author's right to control preparation of derivative works is equivalent to a right of integrity); *Weinstein v. University of Ill.*, 811 F.2d 1091, 1095 n.3 (7th Cir. 1987) (refusing to acknowledge a right of integrity while acknowledging that an author's sole right to prepare derivative works is analogous); *United States v. Microsoft Corp.*, No. 98-1232, 1998 U.S. Dist. LEXIS 14231, *51 (D. D.C., Sept. 14, 1998) (declining to even consider the application of the right of integrity outside the context of visual works).

³⁵ *See, e.g., Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 88 (2d Cir. 1995) (dodging the issue of whether an installation was protected by the right of integrity under VARA by finding that the work was one for hire and thus exempt from VARA). *But see Martin v. City of Indianapolis*, 192 F.3d 608, 609 (7th Cir. 1999) (affirming district court's damage award under VARA after defendant city destroyed plaintiff's sculpture).

³⁶ *See Hansmann & Santilli, supra* note 11, at 96.

oneself necessarily includes the freedom to decide when one is *finished* doing so. However, while constitutional arguments perhaps could be made that the right of disclosure already exists as a penumbral right, these arguments have not been made and nothing in American law grants an explicit right of disclosure. Again, this right is in conflict with the work for hire doctrine; an employer or commissioner of a work legally has the final say over when a work is complete.

The right of withdrawal is the right of an artist to recall a work if he decides it is no longer consistent with his artistic vision.³⁷ This right is limited to published, rather than visual works, and its exercise requires indemnification to the property holder for damages.³⁸ Similar to the right of integrity, this right amounts to an equitable servitude on property, and as such it would surely be difficult for U.S. courts to accept. In the unlikely event that Congress were to muster support for a right of withdrawal, the courts would undoubtedly limit it immediately. Even among jurisdictions where other moral rights have long been accepted, the right of withdrawal has been slow to find enthusiasm, although there is speculation that the European Union may be moving toward an European Union-wide right of withdrawal.³⁹

There are also obvious practical problems with the right of withdrawal, such as the difficulty in establishing an affirmative showing of harm to the author—a prerequisite to an exercise of the right.⁴⁰ Furthermore, given that an author will be liable for indemnification, it would almost always make better economic sense for the author to save the costs of litigation and simply repurchase the work.⁴¹ Given what will often be a high cost of indemnification or repurchase and a wide difference in bargaining strength between authors and publishers, as a practical matter a right of withdrawal may not be of any use to authors.

*Droit de suite*⁴² is an inalienable right to an interest in the resale profits of certain works.⁴³ Although this right is sometimes lumped in with moral rights, it is more clearly an economic right than any of the others. As noted, Anglo-American property law has a strong tradition of the free alienability of property, as well as the freedom to contract, both of which conflict with the *droit de suite*. Property cannot be said to be freely alienable when a person who is not a party to the sale has a right to a cut of the proceeds; the *droit de suite* is an economic encumbrance. The freedom to contract is similarly impinged because, again,

³⁷ See *id.*

³⁸ See *id.* at 139.

³⁹ See *id.* at 140 n.119.

⁴⁰ See *id.*

⁴¹ See *id.* at 140–41.

⁴² This means literally, “right of continuation.” See Ramos, *supra* note 9, at 175.

⁴³ See *id.*

remuneration to the author is made an automatic "term" of any contract for the resale of a piece of art. Yet the *droite de suite* could be of great importance to authors, particularly those who sell their works in obscurity for many years before gaining notoriety. The *droite de suite* could allow these authors either to fetch higher prices for their works in the first place by assigning the right, or to cash in on the benefits of their own success when early works are later resold at many times the original selling price.⁴⁴

The *droit de suite* is unlikely to find a place in American law, however, because it directly conflicts with the "first sale" doctrine,⁴⁵ a well-settled feature of the Copyright Act. The first sale doctrine can be summarized simply as the principle that after an author sells her work, she has no further right to receive reward from its resale—in other words, the exact opposite of the *droite de suite*. Despite the institutionalized hostility in the United States to the *droit de suite*, it remains a significant potential tool for authors to enhance their bargaining position, and should, therefore, be regarded as an economic right during consideration of future legal harmonizations.

C. The Berne Convention

The Berne Convention was drafted in 1891, revised in 1971, and is now acceded to by more than 90 countries.⁴⁶ The Convention is administered by the World Intellectual Property Organization.⁴⁷ The moral right provision of Berne is article 6bis, which affords authors limited rights of attribution and integrity.⁴⁸

The Convention, as stated, was explicitly made non-self-executing by the Berne Convention Implementation Act in the United States. The United States is

⁴⁴ The *droite de suite* has a certain moral appeal in this regard. Take, for instance, the case of American singer/songwriter Billy Joel, who, while still inexperienced, sold the rights to many of his early hits and thus reaped virtually no financial reward from some of his most successful songs while others grew rich. Such stories, and there are many in the history of art and music, are at odds with traditional American notions of fair dealing and profiting from one's ingenuity.

⁴⁵ 17 U.S.C. § 109(a) (1994).

⁴⁶ See Ramos, *supra* note 9, at 174.

⁴⁷ See Kwall, *How Art Fares*, *supra* note 6, at 3.

⁴⁸ Article 6bis states:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which shall be prejudicial to his honor or reputation.

not unique in this regard—many signatories have not adopted Berne *in toto*.⁴⁹ Worldwide, Berne can thus be viewed less as a piece of self-executing legislation, and more similar to an European Union directive, with signatories free to adapt it to their national tastes.⁵⁰

Certainly its ultimate applicability to U.S. law remains to be seen. The adoption of the Berne Convention by the United States brought with it the first timid step by the U.S. Congress toward a recognition of moral rights. However, while Congress has shown some inkling of fortitude, the courts may not be so adventurous. In the absence of strong Congressional action, the courts are not going to give Berne any effect. The general doctrine of federal preemption and the “last in time” rule is enough for courts to conclude that VARA delineates the extent to which 6bis is to be given effect. Indeed, Congress explicitly manifested its desire for this result.⁵¹

Rather than viewing the accession to Berne as throwing open the door to moral rights, it is probably safer to view it as a largely symbolic action. VARA’s *de minimis* moral right protections are likely, as a practical matter, to be all that U.S. authors are going to get in this regard for some time.

D. *The Visual Artists Rights Act (“VARA”)*

Passage of VARA⁵² was the first real step by Congress toward any formal recognition of explicit moral rights. VARA is extremely limited in its scope. It applies only to “visual art,” and provides a limited definition of what constitutes visual art. A work must consist of two hundred copies or less, signed and numbered.⁵³ VARA also provides a limited right of integrity in that it gives a right to prevent destruction of work of “recognized stature.”⁵⁴ VARA excludes from the definition of visual works: posters, maps, publications, audiovisual

⁴⁹ See World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works (last modified Mar. 20, 2000), <<http://www.wipo.org/eng/ratific/e-berne.htm>>.

⁵⁰ See Kwall, *How Art Fares*, *supra* note 6, at 3; Susan Stanton, *Development of the Berne International Copyright Convention and Implications of United States Adherence*, 13 HOUS. J. INT’L L. 149, 149 (1990). European Union directives are not self-executing legislation. Instead, they must be implemented by national legislation, a process which allows for differences among national laws. Such differences are tolerated to the extent that they do not conflict with the goals of the directive, as determined by the European Court of Justice.

⁵¹ Visual Artists Rights Act of 1990, Pub. L. No. 101-650 (1990) (codified as amended in scattered sections of U.S.C.).

⁵² See *id.*

⁵³ See 17 U.S.C. § 101 (1994).

⁵⁴ See § 106A(a)(3)(B).

works, charts, diagrams, databases, etc.⁵⁵ There is no right of duration, withdrawal, or *droit de suite*. Most importantly to this analysis, VARA explicitly exempts works for hire from any of its protections.⁵⁶

There is another important difference between continental moral rights and those delineated under VARA. Sections 106 and 113 of the Copyright Act allow authors to waive their moral rights under the Berne Convention and VARA by written instrument. Moral rights, as “personality rights,” traditionally cannot be waived.

E. Possible Conflicts Between Moral Rights and the Constitution

1. Transformative Works vs. The Right of Integrity

In addressing the tricky issue of parody, the U.S. Supreme Court held that “the goal of copyright . . . is generally furthered by the creation of transformative works.”⁵⁷ This is true because copyright protection is meant to achieve two principal aims: To foster innovation and to allow innovators to profit from their works.⁵⁸ Yet transformation of a work, at least a substantial transformation, is violative of the right of integrity.

Transformation of a work by anyone other than the author of a visual work may violate an author’s right of integrity under VARA as well. Thus, as American copyright law currently stands, there is a fundamental tension between the broad purposes of copyright law and the right of integrity granted under VARA, a feature of the Copyright Act. Very few courts have recognized this tension.⁵⁹ However, the cases where plaintiffs have tried to enforce their rights of integrity have most often resulted in the court finding another way to dispose of the issue.⁶⁰ It may be coincidence that the cases arising are so often disposed of without any real treatment on the merits, but one wonders. To the extent that moral rights conflict with the underpinnings of copyright law, judges and clerks

⁵⁵ See § 101.

⁵⁶ See *id.*

⁵⁷ *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994).

⁵⁸ U.S. CONST. art. I, § 8; *Campbell*, 510 U.S. at 569.

⁵⁹ See *supra* notes 32, 34–35 and accompanying text.

⁶⁰ See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995) (finding that because the work was for hire the issue of VARA protection did not need to be ruled on); *Lubner v. City of Los Angeles*, 53 Cal. Rptr. 2d 24 (Cal. Ct. App. 1996) (holding that simple negligence was not enough to invoke moral right protection where a car accident destroyed a work of art); *Moakley v. Eastwick*, 666 N.E.2d 508 (Mass. 1996) (avoiding having to rule on state moral right claim by holding that the law did not apply retroactively to works created before its enactment).

may be dreading a head-on disposition of the issue.

2. Federal Preemption

An unanswered question is whether federal copyright law, including VARA, preempts state action concerning moral rights. Despite the recent proliferation of state moral right statutes, VARA provides that rights under section 106A, moral rights, are to be exclusively governed by section 106A.⁶¹

State moral rights laws include: California (prohibiting the destruction of "fine art");⁶² Louisiana (applies to visual works of recognized quality);⁶³ Maine (applies to visual works regardless of quality);⁶⁴ Massachusetts (alteration of a work is actionable, a "pure" right of integrity);⁶⁵ New Jersey (applies to visual works regardless of quality);⁶⁶ New Mexico (only applies to art in government buildings);⁶⁷ New York (display of altered work is actionable, underlying alteration is subject to right to prepare derivative works under federal copyright law);⁶⁸ Puerto Rico;⁶⁹ Rhode Island;⁷⁰ and others.⁷¹

Research for this Paper has not yielded a case where a state moral right statute has been struck down on preemption grounds. In fact, at least one court found that the federal Copyright Act did not prevent a state moral rights statute because moral rights were outside the subject matter of the Copyright Act.⁷² Nonetheless, the possible scenarios for federal preemption in this area are numerous.

Although Congressional silence is always difficult to interpret, Congress

⁶¹ Nonetheless, VARA adds that nothing in its preemption clause "annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . any cause of action from undertakings commenced before the effective date" of the federal legislation. 17 U.S.C. § 301(f)(2)(A) (1994). At least one court has used this language to allow application of a state moral right statute. *See Pavia v. 1120 Ave. of the Americas Assocs.*, 901 F. Supp. 620, 627 (S.D.N.Y. 1995).

⁶² *See* CAL. CIV. CODE §§ 987(c)–989(c) (West Supp. 2000).

⁶³ *See* LA. REV. STAT. ANN. §§ 51:2153, 2156 (West Supp. 2000).

⁶⁴ *See* ME. REV. STAT. ANN. tit. 27, § 303 (West 1996).

⁶⁵ *See* MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1996).

⁶⁶ *See* N.J. STAT. ANN. §§ 2A:24A-4, -5, -8 (West 1999).

⁶⁷ *See* N.M. STAT. ANN. §§ 13-4B-2 to 13-4B-3 (Michie 1997).

⁶⁸ *See* N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1999–2000).

⁶⁹ *See* Act No. 96, July 15, 1988, 31 L.P.R.A. § 1401 (adding Article 359 to the Civil Code of 1930).

⁷⁰ *See* R.I. GEN. LAWS §§ 5-62-3, -6 (Michie 1994).

⁷¹ *See* Kwall, *How Art Fares*, *supra* note 6, at n.166–72; Ramos, *supra* note 9.

⁷² *See* Wojnarowicz v. American Family Assn., 745 F. Supp. 130 (S.D.N.Y. 1990).

spoke with the enactment of 17 U.S.C. § 106A. Courts could rule that by so doing Congress intended to foreclose state action in the moral rights area. However, such a ruling could fall victim to the doctrine of unintended consequences. If the Supreme Court were to adopt such a holding, effectively striking down a dozen or more state statutes, pressure might finally be put on Congress to support the passage of meaningful moral rights improvements at the federal level. It is also possible that the confusion over the appropriate level of moral right protection will combine with the current federalist trend in both Congress and the courts to defer to state action (as opposed to federal action, in contexts ranging from welfare reform to water rights) resulting in the states being left alone. However, it will be difficult to predict how state moral rights statutes will fare, at least until other courts have an opportunity to consider *Wojnarowicz*.⁷³

Another conceivable basis for federal preemption is the Commerce Clause. To the extent that the rights of integrity and attribution may be viewed by the courts as de facto equitable servitudes, and thus restraints on free alienability of property, they might be seen as interfering with interstate commerce.⁷⁴ Ironically, while such a determination would probably be made in the context of striking down a state moral rights statute, it would also greatly bolster one of the basic propositions of this Paper, that moral rights are economic in nature.

3. *Unconstitutional Takings*

In the same way that certain moral rights may put constraints on the alienability of property, giving an author a continuing and unalienable interest in a piece of property owned by another may amount to an unconstitutional taking. This is so because the enforcement of, for instance, a right of withdrawal, would require government action. *Carter v. Helmsley-Spear*⁷⁵ held that VARA did not create an unconstitutional taking because the art installation in question was *temporary*. However, this holding hardly puts the question to rest.

In theory, this might explain Congressional reluctance to enhance federal moral rights. There may be concern that increasing restrictions on the alienability of property may simply open the door for Congress to be handed an unnecessary defeat from the Supreme Court. After all, why create problems where none exist? If this is the thinking, it is short-sighted. The need to protect American authors abroad necessitates improved regularity of law, and militates for

⁷³ See *id.*

⁷⁴ See Sheldon W. Halpern, *Of Moral Right and Moral Righteousness*, 1 MARQ. INTELL. PROP. L. REV. 65, 85 (1997) (cautioning that disparities between various state moral right laws are creating a confusing and unharmonious legal landscape).

⁷⁵ 71 F.3d 77 (2d Cir. 1995).

international enforcement mechanisms (definitely not a favorite of American lawmakers, and quite possibly also an unconstitutional taking under current jurisprudence).

III. WORKS FOR HIRE

The Copyright Act of 1976 defines a work for hire as: (a) a work prepared by an employee in the scope of employment (the common law of agency determines who falls into this category), or (b) a work which is specially commissioned as part of a collective work, *and* there is a signed instrument in which parties agree that the work is one prepared for hire.⁷⁶

The seminal case concerning what constitutes a work for hire is *Community for Creative Non-Violence v. Reid*.⁷⁷ In *Reid*, the U.S. Supreme Court set forth the rule that doctrines of the law of agency should be employed to determine who is an "employee" and what constitutes "scope of employment."⁷⁸ In so doing, the Court explicitly rejected the use of a "right to control" test.⁷⁹

IV. WORLDS COLLIDE: THE APPLICATION OF MORAL RIGHTS TO THE WORK FOR HIRE DOCTRINE

The following analysis centers on the application of the various moral rights to works for hire in the context of works prepared by author-employees for mass production. Professors Hansmann and Santilli have already written an excellent article on the effects that applying these rights would have on traditional artists.⁸⁰ Because that analysis has already been done, this Paper examines the economic consequences of applying moral rights to areas where they have been wholly excluded in U.S. law.

Full application of the affirmative right of attribution would allow employee-authors to have their names attached to their work, although their employers would still legally be considered the authors of the work, and would accordingly hold the copyrights. This would be likely to have two principal consequences: First, it would tend to give employee-authors greater recognition in their field, and greater bargaining power over the terms of their employment. If, for instance, every copy of Windows 98 listed every software designer who played a substantial role in its creation on its packaging, or on the splash screen, these

⁷⁶ See 17 U.S.C. § 101 (1994).

⁷⁷ 490 U.S. 730 (1989).

⁷⁸ *Id.* at 739-41.

⁷⁹ *Id.* at 741-42.

⁸⁰ See generally Hansmann & Santilli, *supra* note 11.

people would achieve a degree of public notoriety which would otherwise simply accrue to the Microsoft Corporation. Therein, the right of attribution can be viewed as an economic right; attribution brings notoriety. This notoriety would likely then translate into successful employee-authors improving their bargaining position when negotiating in the future for terms of employment. Accordingly, the right of attribution improves the author's ability to capitalize on his creations, an economic benefit.

Second, the knowledge that by succeeding in creation at work an author's name would attach to the work in perpetuity, would give authors an incentive for improved job performance. The sense of personal ownership over the work, which the right of attribution likely would bring, would provide an incentive that would tend to spur productivity and innovation. Employers would benefit from this additional motivating factor in terms of increased employee productivity and effort. Again, the right of attribution would have economic consequences; in this context, those consequences would include the potential for economic gain to employers.

Any move by Congress to create an attribution right, which would override the work for hire doctrine, would undoubtedly meet with howls of outrage from the private sector. Such a shift in the law would, after all, tend to raise labor costs. The effects could, in theory, be economically destructive; as labor costs rise companies are more likely to raise prices, move operations abroad, and eliminate domestic jobs. Certainly these are the sorts of dire predictions representatives would be bombarded with while considering such a move.

However, such concerns are likely to be largely unfounded. Although a right of attribution might result in increased labor costs in the short term, should this result in a sharp rise in unemployment for professional authors, wage demands would decrease. Should employers choose to move their operations abroad, they may not, over time, accomplish their goals; if foreign authors enjoyed a right of attribution in the United States, they would eventually find themselves in the same bargaining position with American companies as American authors.

The ultimate effect of allowing a right of attribution to fully attach to works for hire could be that author-employees might ultimately find themselves holding greater equity positions in their companies. This is a desirable result. A company whose main products are intellectual property derives its value from the collective expertise of its employees. To allow those employees to compete for a greater share of that wealth is simply to allow credit to be given where it is due. Moreover, increased employee equity-holding is associated with increased productivity, greater employee loyalty, and improved product quality.⁸¹ Saturn

⁸¹ Research by those who are in favor of this particular business philosophy suggests that offering workers a piece of the rock increases their loyalty, improves their work effort and

and American Airlines provide examples of companies that have achieved economic success in extremely competitive industries by allowing increased employee ownership of the company.

Allowing free alienability of the right of attribution in the work for hire context would probably tend to bring more negative results.⁸² If employee-authors are able to dispose of their right of attribution, such a disposal would likely become part of every boilerplate employment contract, and would quickly render the right meaningless. In the alternative, it might simply raise labor costs as companies pay to buy out these rights, without increasing employee equity ownership. The reason why this would be so is that the buyout would be a one-time cost. This scenario could definitely result in increased labor costs and subsequently higher prices. By making the right of attribution inalienable, as a true moral right, the end result could be a gradual (and, in all likelihood, relatively small) increase in employee ownership of companies producing intellectual products. By only going halfway, and providing for a freely alienable right of attribution in the context of works for hire, the possible economic consequences seem not only less desirable, but undesirable.

There is little, if any, support for this view among commentators. Professors Hansmann and Santilli argue that the right of attribution need not apply to works for hire because works for hire are subject to a great degree of control by employers-commissioners, and as such are not "art."⁸³ In the alternative, Hansmann and Santilli argue that when an employee-author prepares a work for hire he is waiving his moral rights by waiving his ability to assert full creative control over the work.⁸⁴ This approach makes sense if moral rights are viewed in their classical context: protection for creators of fine art. However, because the law of copyright governs all manner of nonartistic creation,⁸⁵ it is not illogical to

aligns their interests with those of the company. Moreover, there appears to be a strong correlation between employee "ownership" and corporate profitability. See Scott Hayes, *Ownership Cultures' Create Unity: Employee Stock-Ownership Plans Can Help Grow the Company's Top Line by Inspiring Workers to Think and Act Like Owners*, WORKFORCE, Feb. 1999, at 60.

⁸² Although this analysis bears some resemblance to the analysis of the economic interests attached to the right of integrity advanced by Professors Hansmann and Santilli, the similarity was not intended. The foregoing economic analysis was based solely on the author's own interpretations of possible economic consequences. Any mistakes or logical errors are the author's own, and this section should not be read as a mangled rewrite.

⁸³ See Hansmann & Santilli, *supra* note 11, at 134. In arguing for the general proposition that moral rights are pecuniary rights, these commentators generally rely on the context of protecting the economic rights of "artists," as opposed to creators of fungible products.

⁸⁴ See *id.*

⁸⁵ See, e.g., *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992) (allowing copyright protection for video "pong"). While creation of the game in question certainly

extend moral right to nonartistic works of original authorship, especially where there is an economic justification.⁸⁶ The U.S. Supreme Court has, after all, articulated that the underlying goals of copyright law are economic.⁸⁷ Perhaps then, the most sensible approach for proponents of moral rights is to frame them as economic rights, and make economic arguments in their defense. In addition, Hansmann's and Santilli's position that employee-authors do not produce "art," in the same sense as independent artists is oversimplistic and misguided. First, it is not always true. Some employee-authors do have total control over their works. Second, even where they do not, the ability of the employer to guide the shape of the work would only render the employer a joint author under section 101 of the Copyright Act, but for the employment relationship. Thus, in a situation where all else was equal, except for the employment relationship, the law of copyright already acknowledges that the author whose work is guided by another remains an author. Whether it is proper for the fact of the employment relationship to vest title to the copyright in the work to the employer is a subject left for another day, but where the law would recognize authorship but for the employment relationship, its existence should not be enough to totally divest the author of all rights in the work. The employee-author should have a continuing right to have her name attached to the work; the right of attribution should be merged with the work for hire doctrine.

By contrast, full application of the right of integrity to works for hire is problematic. If employee-authors have the final say over the form of a product, quality control and uniformity within an industry become virtually impossible. For instance, should a designer of Windows 98 have the final word on the shape the product will take, she could be motivated by concerns which are noneconomic; for instance, an artistically motivated choice of form over function. Such a state of affairs does not serve broad economic interests. Therefore, it is appropriate that employers and commissioners maintain broad discretion to specify characteristics of a work in advance, and to alter the work as needed to achieve economic goals (i.e. marketability, compatibility with other products, safety, etc.).

Again, Professors Hansmann and Santilli take the opposite view, arguing for full application of the right of integrity.⁸⁸ Their argument is entirely cogent

required creativity, it was not art in the classical sense.

⁸⁶ Another criticism of the Hansmann-Santilli approach is the invariable difficulty in determining what constitutes "art." In their article, Hansmann and Santilli try to address this question, only to fall back to an economic analysis. See Hansmann & Santilli, *supra* note 11, at 108. It may be easier, because of the difficulty in pinning down "art" to simply abandon trying and proceed with an economic analysis of the problem from the outset.

⁸⁷ See *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁸⁸ See Hansmann & Santilli, *supra* note 11, at 104.

because they write in the context of the classical model of an artist. In that context there is a compelling argument for the right of integrity; indeed, an artist's pecuniary interests are inextricably linked to the survival, intact, of his previous work. However, context is everything. In the case of an author preparing works in the scope of his employment, one has to assume that the author is performing an economic role that has ramifications well beyond his own pecuniary interests. These economic considerations must be taken into account in analyzing the propriety of making sweeping changes in employee-authors' legal rights.

In this context, the argument Hansmann and Santilli advance, pertaining to the right of attribution, is much stronger. Where the employer asserts great control over the shape of the work, the author could be said to waive a right of integrity. It is still the author who *creates* the work, and so she should be entitled to be recognized as such. But given what may be a lack of real creative input, employee-authors should have less right to preserve its form.

The analysis is essentially the same for the right of disclosure. Because the right of disclosure is bound up with issues of creative control, entering a situation where creative control has been waived (as in a work for hire setting) reasonably constitutes a waiver of the right of disclosure. While the potential cost to employers of allowing authors to be recognized as such could be significant, the cost of allowing authors to delay production indefinitely could be disastrous.

Allowing a right of withdrawal could, at first blush, appear to have serious economic consequences. However, as Hansmann, Santilli, and this Paper illustrate, it may be largely meaningless.⁸⁹ Again, keep in mind that this analysis is conducted in a different context; while Hansmann and Santilli were primarily concerned with artists, this Paper is primarily concerned with author-employees. The point is well taken that a right of withdrawal does not mean much when the artist will have to buy back the work anyway.⁹⁰ This is only more starkly true when the cost of buying back, for instance, Windows 98, is well beyond the means of almost any individual. Therefore, there is little point in applying this right generally to U.S. law. In the work for hire context it would, as a practical matter, be an empty gesture; there really is no point in creating a "right" that hardly anyone can afford to exercise.

Application of the *droit de suite* to works for hire presents a number of advantages to employee-authors, but a number of troubling economic concerns as well. There can be no question that the *droit de suite* is an economic right. Policy arguments could be made that, similar to the analysis of the right of integrity above, application of the *droit de suite* would tend to economically

⁸⁹ See *id.* at 139.

⁹⁰ See *id.*

empower employee-authors and shift the balance of power away from employers. Certainly there are uncountable cases of employee-authors who have watched their creations make others rich. However, practical considerations militate against all but the most limited application of this doctrine in the work for hire setting.⁹¹ An inevitable explosion of litigation would result, creating costs where none now exist. As a practical matter it would simply be impossible to account for all resale profits of mass produced items. Furthermore, the first sale doctrine is squarely at odds with the *droit de suite*. It may be desirable, however, to give some limited right of *droit de suite* in the case of fine art works for hire, so as to allow authors to benefit from resale of their works should the works appreciate greatly after their creation.

V. CONCLUSION

These arguments are made with an awareness of Professor Halpern's caution that "moral right is culturally dependent," and "may be parochial rather than universal legal principles."⁹² However, by proposing a normative rather than a descriptive model, this Paper makes the point that regardless of the origins of moral right principles, they have economic consequences which may strengthen the case for their emergence as universal principles. Despite the currently unsettled definition of these rights, there is a case for the limited development of moral right as bedrock doctrine. After all, capitalism and democracy began as culturally specific ideas as well.

If one is willing to look beyond the traditional view of moral rights, that they apply exclusively to "artists," (with a capital "A"), there is economic utility in allowing a right of attribution to supersede the work for hire doctrine. However, there are strong economic disincentives to extend other forms of moral right to works for hire, so long as the discussion remains focused on works that are produced by employee-authors for mass production.

Allowing employee-authors to receive notoriety for their creations would tend to create a situation where these authors have an improved ability to capitalize on their own talent. In addition, pride of ownership and the sense of enfranchisement that would accompany the right to have one's name permanently attached to one's work, regardless of the context in which that work was created, would tend to provide incentive for increased productivity, creativity, and efficiency. Integration of the moral right of attribution into the works for hire doctrine is thus an economically desirable goal. The remaining

⁹¹ See Halpern, *supra* note 74, at 85 (calling the extension of *droit de suite* "an invitation to legal-aesthetic chaos").

⁹² *Id.*

moral rights, while perhaps meritorious, would tend to have negative economic consequences if combined with the works for hire doctrine, and thus they should not be.

